

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

EDWARD JEROME HARBISON,

Plaintiff,

v.

GEORGE LITTLE, *et al*,

Defendants.

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No. 3:06-cv-01206
Judge Trauger

MOTION TO ALTER OR AMEND

COMES NOW Edward Jerome Harbison, and, pursuant to Rule 59(e) Federal Rules of Civil Procedure, moves this Court for an order altering and amending that judgment entered herein on September 19, 2007 (R.144) to include a stay of Mr. Harbison's execution presently scheduled for 1:00 a.m. on 26th day of September, 2007.

As grounds for this motion, Mr. Harbison asserts: the best information available to undersigned counsel indicates the State of Tennessee plans to carry out Mr. Harbison's execution; that there exists no lethal injection protocol under which Mr. Harbison may be constitutionally executed; that no alternate constitutional means to execute Mr. Harbison is available under Tennessee law because state law requires he be executed by means of lethal injection;¹ that Defendants, by failing to act promptly in this matter have deprived Mr. Harbison of his rights to due process and/or to access the

¹Even in the event that the Tennessee courts hold such an alternate means to be available any such holding would be arbitrary and capricious and violate Mr. Harbison's right to due process under the 14th Amendment to the Constitution of the United States *Bush v. Gore*, 531 U.S. 98 (2000)

courts to challenge any newly created and allegedly constitutional lethal injection protocol; and, that Defendants, through their inequitable and outrageous conduct are estopped from going forward with Mr. Harbison's execution by any means.

IN SUPPORT HEREOF, Plaintiff would show to the Court as follows:

1. In its Order dated September 19, 2007, the Court referred to Tennessee Code Annotated § 40-23-114(d) providing that in the event an execution method is declared unconstitutional, a sentence of death shall remain in force until it can be carried out by any lawful means. (R. 148) Upon the best information available to undersigned counsel, it appears that the State Attorney General's Office has interpreted this portion of the Court's order as to permit Mr. Harbison's execution by other means. The State is wrong and this Court's order should be altered to include a stay of execution.

2. The circumstances in which the State of Tennessee may carry out an execution by alternate means, however, is controlled by Tennessee Code Annotated § 40-23-114(d) which provides that an execution may be carried out "by any constitutional method of execution" only when "lethal injection . . . is held to be unconstitutional by the Tennessee supreme court under the Constitution of Tennessee, or . . . by the United States Supreme Court under the United States Constitution, or if the United States supreme court declines to review any judgment holding lethal injection ... to be unconstitutional under the United States Constitution made by the ... United States court of appeals that has jurisdiction over Tennessee..." . This statute is inapplicable and the Court's order should be altered to so reflect.

- a. The plain language of the statute dictates its provisions are not triggered until “lethal injection ... is held to be unconstitutional.” This Court did not declare lethal injection to be unconstitutional, merely the means by which the State of Tennessee chose to carry out lethal injections. This Court simply declared Tennessee’s new lethal injection protocol unconstitutional. Lethal injection as a method of execution has not been declared unconstitutional.
- b. The plain language of the statute dictates its provisions are not triggered until the United States Supreme Court either affirms this Court’s order or declines to review the Sixth Circuit’s decision affirming this Court’s order. This has not yet happened.
- c. Execution through electrocution, the only method of execution which has neither been declared unconstitutional nor been found to be carried out in an unconstitutional manner, is clearly not available under Tennessee law. The method of execution for carrying out death sentences “shall be by lethal injection.” Tenn. Code Ann. § 40-23-114(a). Although state law permits Mr. Harbison to “choose” electrocution, he did not. See Tenn. Code Ann. § 40-23-114(b).
- d. Even in the event Defendants could persuade a Tennessee state court to ignore the plain and unambiguous language of Tennessee Code Annotated § 40-23-114(d) and hold that they could execute Mr. Harbison by means of electrocution, such a ruling would be totally arbitrary and

capricious and violate Mr. Harbison's rights under the 14th Amendment.

Bush v. Gore, supra.

3. Given the Court's injunction, Defendants can therefore only proceed with Mr. Harbison's execution if, after having been found to have violated the Constitution of the United States through the creation and implementation of one lethal injection protocol which they claimed to be constitutional, they can constitutionally execute Mr. Harbison under a protocol that was created in total secrecy less than three working days prior to his execution, that was also merely claimed to be constitutional, and that was not revealed until such time as Mr. Harbison could not challenge the constitutionality of that protocol. The Constitution of the United States does not permit the secret execution of its citizens by secret means.

4. In addition, and as separate and distinct grounds, Defendants have engaged in conduct which is both inequitable and outrageous and should be estopped from benefitting from that conduct. This Court's order was entered almost 2 days ago. His execution is scheduled in less than 3 working days away.

- a. On September 19, 2007, undersigned counsel, after reviewing the Court's order, contacted Defendants' trial counsel, Mr. Hudson, and asked about Defendants' intentions regarding Mr. Harbison's scheduled execution. Mr. Hudson informed undersigned counsel that any appeal would be handled by Assistant Attorney General Joseph Whalen.
- b. On that same afternoon, undersigned counsel left a voice mail message for Mr. Whalen, together with undersigned counsel's business phone

number, and personal cellular phone number, seeking the same information. Mr. Whalen has never returned undersigned counsel's call.

- c. On September 20, 2007, undersigned counsel contacted Steven Elkins, Governor Bredesen's counsel, and, *inter alia*: (1) inquired whether the Governor would be granting a temporary reprieve to Mr. Harbison to allow the State time to create a constitutional lethal injection protocol similar to that granted on February 1, 2007; (2) inquired whether Mr. Elkins knew about Defendants' intentions regarding Mr. Harbison's scheduled execution; (3) informed Mr. Elkins that Mr. Whalen had refused to return undersigned counsel's telephone call and sought Mr. Elkins' intervention; and, (4) informed Mr. Elkins that any attempt by the State of Tennessee to purport to enact a "constitutional" lethal injection protocol at the last minute were nothing more than shenanigans which would not be countenanced by any court. Mr. Elkins responded by simultaneously stating that undersigned counsel's prediction of Defendants' behavior would not be taken seriously while also asking undersigned counsel to comment on whether the afore-described language from the Court's Order (R. 148) permitted the Defendants to go forward with Mr. Harbison's execution.
- d. On date same, undersigned counsel's investigator spoke with the Deputy Warden at Riverbend. The Deputy Warden informed the investigator that Mr. Harbison will be moved to death watch and the execution will proceed unless the Deputy Warden is instructed otherwise.

- e. On September 21, 2007, spoke with the Chief Deputy Clerk of the United States Court of Appeals for the Sixth Circuit, who informed undersigned counsel that notwithstanding Mr. Harbison's execution date, the Court had not been contacted by counsel for Defendants. On date same, Ms. Chavis spoke with Mr. Harbison who said a corrections employee told him the prison was preparing for his execution by electrocution. On date same, Ms. Chavis spoke to the emergency applications clerk at the Supreme Court of the United States who stated that Defendants had also not had any contact with that Court.
- f. Defendants' conduct is inequitable and outrageous. If Defendants intend not to proceed with Mr. Harbison's execution and instead develop a protocol to constitutionally carry out Mr. Harbison's lethal injection, their refusal to communicate those intentions to opposing counsel and the federal courts has created an inestimably large waste of the resources of the taxpayers of the United States. If Defendants intend to deny Mr. Harbison access to the courts by hiding their intention to adopt a new protocol until Mr. Harbison is unable to ascertain its constitutionality, Defendants have hidden relevant facts (*i.e.*, that a new protocol is being created), with the intention that Mr. Harbison rely upon their inaction and not challenge the new protocol, and Mr. Harbison will be undeniably prejudiced. Defendants are estopped from benefitting from that conduct. *TWM Mfg. Co., Inc. v. Dura Corp.*, 592 F.2d 346, 350 (6th Cir. 1979).

5. Clearly, Defendants cannot proceed under the current protocol, therefore Mr. Harbison is likely to prevail on any action to enforce this Court's judgment. Equally clearly, Defendants cannot proceed with Mr. Harbison's execution by electrocution under Tennessee law and Mr. Harbison is likely to prevail on any action to prevent them from doing so. Finally, equity prevents Defendants from concealing any new lethal injection protocol until it cannot be challenged and then executing Mr. Harbison under that protocol. *Christopher v. Harbury*, 536 U.S. 403, 412-414 (2002) Mr. Harbison is therefore likely to prevail on the merits should they attempt to do so.

6. There is also no remedy at law. Mr. Harbison will be dead by the time Defendants' conduct is reviewed upon the merits. Finally, the prejudice which Mr. Harbison will suffer cannot be greater. *In re: Holladay*, 331 F.3d 1169, 1176 (11th Cir. 2003)(granting stay of execution); *In re: Morris*, 328 F.3d 739, 741 (5th Cir. 2003)(same).

7. Wherefore, Mr. Harbison respectfully requests the Court alter and amend its order of September 19, 2007 to include a stay of execution.

This the 21st day of September, 2007.

Respectfully submitted,

FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2007, the foregoing *Motion to Alter or Amend* was filed electronically. Notice electronically mailed by the Court's electronic filing system to all parties indicated on the electronic filing receipt. Notice delivered by other means to all other parties via regular U.S. Mail. Parties may access this filing through the Court's electronic filing system.

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